88- 1843

Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

VINCENT VICTOR ROGGIO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

C. ALEXANDER HEWES, JR.
HEWES, MORELLA, GELBAND
& LAMBERTON, P.C.
Suite 300
1000 Potomac Street, N.W.
Washington, D.C. 20007
(202) 337-6200
Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the defendant's 6th amend. right to counsel and 5th amend. due process rights were denied where the defendant did not waive his right to counsel, specifically complained to the trial court before trial about the lack of preparation of counsel and the trial judge, without the prior knowledge of the defendant, excluded the defendant from an unrecorded in-chambers meeting with government counsel and defense counsel thereafter refusing to address the substantial complaints in open court in square conflict with *Kentucky v. Stincer*, 107 S.Ct. 2658 (1987) and in conflict with the 2nd, 5th, 6th, 7th, 9th, and 10th circuits.

2. Whether the defendant's 5th amend. right to due process was violated where the indictment was based on:

a. false testimony which the government knew was false;

b. the key grand jury exhibit which contained false information, was manufactured by the government and then "lost" before trial; and,

c. documents withheld from the grand jury which directly negated the guilt of the defendant, all of which related to the charges in the indictment, and all of which substantially influenced the willingness of the grand jury to indict in conflict with *Bank of Nova Scotia v. U.S.*, 108 S.Ct. 2369 (1988).

3. Whether the Petitioner's 5th amend. right to due process was violated where the government suppressed information and a document specifically requested by the court to be produced which contradicted the testimony of two key government witnesses and negated the guilt of the Petitioner as to specific allegations in the indictment in conflict with *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) and *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340 (1935).

4. Whether the Petitioner's 5th amend. right to due process was violated with mail fraud convictions based on mailings:

a. which were not incident to an essential part of the alleged scheme;

b. which afforded the Petitioner no benefit and were not intended to lull the victims into a false sense of security, postpone their complaint to the authorities and make the apprehension of the Petitioner less likely than if no mailings had taken place;

c. where the alleged scheme reached fruition before the mailings occurred; and,

d. where the causing of the mailings was not foreseeable by the Petitioner, all in conflict with *U.S. v. Maze*, 414 U.S. 395 (1974), *U.S. v. Lane*, 474 U.S. 438, 106 S.Ct. 725 (1986) and *Schmuck v. U.S.*, No. 87-6431, slip op., March 22, 1989.

5. Whether the Petitioner's 5th amend. right to due process was violated where:

a. the trial judge appeared to vouch for the credibility of the key government witness just before instructing the jury;

b. where no special instruction was given to the jury in response to its question during deliberations about the credibility of this witness; and,

c. where the key jury instruction as to the charged crimes did not contain a requirement of a *mens rea* finding as an element, all in conflict with *Bollenbach v. U.S.*, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1946) and *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965 (1985).

6. Whether the Petitioner's 5th amend. right to due process was violated where the indictment:

a. did not give proper notice as to what the Petitioner had been charged with;

b. charged the Petitioner with acts as crimes which, in fact, are not crimes and which were abandoned by the government mid-trial; and,

c. broadened the indictment, in conflict with *U.S. v. Miller*, 471 U.S. 130, 105 S.Ct. 1811 (1985).

7. Whether the Petitioner's 6th amend. right to a speedy trial was violated and the sanctions of the Speedy Trial Act circumvented where:

a. an ineffective counsel has failed to assert the defendant's rights;

b. the trial court unsuccessfully ordered the Petitioner to waive his rights under the Act;

c. the trial court intimidated defendant's counsel into not raising the issue while, *sua sponte* continuing the cases for eight months without an "ends-of-justice" analysis; and,

d. the factors under *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) all favor the Petitioner contrary to the Eleventh Circuit Opinion.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner Vincent Victor Roggio respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on January 11, 1989.

OPINION BELOW

The slip opinion of the United States Court of Appeals for the Eleventh Circuit is reported at Nos. 87-5694, 87-5695, January 11, 1989. It is reprinted in the appendix to this petition at pp. 1a-4a.

JURISDICTION

The jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291; The opinion and judgment of the Court of Appeals were entered on January 11, 1989. A Suggestion for In Banc Consideration was timely filed on February 12, 1989 and denied on March 14, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

See Appendix pp. 41a-46a.

STATEMENT OF THE CASE

A. Statement of the Course of Proceedings and Disposition of the Case

The Appellant, Vincent Victor Roggio was indicted on August 7, 1984 Case No. 84-8069-CR-SPELLMAN ("Case 8069") alleging violations of 18 U.S.C. § 1341 and § 2 (Mail Fraud, Aiding and Abetting) and 18 U.S.C. § 1014 and § 2 (False Statement, Aiding and Abetting) in six counts. On October 3, 1985, a second indictment was returned against Petitioner in Case No. 85-0764-CR-KING ("Case 764") alleging a single viola-

tion of 18 U.S.C. § 1014. Trial commenced on February 9, 1987 and continued for approximately ten and one-half weeks.

On April 20, 1987, Petitioner was convicted by a jury on all six counts in Case 8069 and the single count in Case 764 (the cases had been consolidated on the day trial commenced). On July 29, 1987, Petitioner was sentenced to 12 years imprisonment, and five years probation.

A Notice of Appeal was filed as to both of the cases on August 5, 1987. Oral argument was held on November 8, 1988 and a three judge panel of the U.S. Court of Appeals, 11th Circuit, affirmed the judgment of the District Court on January 11, 1989. Petitioner has been incarcerated since July 29, 1987.

B. Statement of Facts

Petitioner and J. Lynn Helms (former Administrator of the Federal Aviation Administration from 1980-1984, appointed by President Reagan) were business partners for approximately nine years between 1975 and 1984. Petitioner and Helms had joint interests in many different business entities.

Count I of the Case 8069 indictment charged Petitioner with defrauding Barnett Bank by causing the mailing of an unsigned $150,000 promissory note from the bank to Charles Ascenzi (initially a co-defendant), an employee at Devon Industries, the Helms-Petitioner holding company in Pennsylvania. Counts II and III charged Petitioner with defrauding Pan American Bank by causing the mailing of an unsigned $500,000 loan guarantee from that bank to Ascenzi and Ascenzi's mailing of the same guarantee back to the bank after Ascenzi had affixed Helms' signature to it.

Count IV charged Petitioner with submitting a financial statement to Barnett falsely reporting total liabilities of $3 million when, according to the indictment, he knew his total liabilities as of December 31, 1981 and between September 1, 1982 and October, 1982, were in excess of

$10 million. Count V charged Petitioner with making a false statement to the bank by causing the submission of the $150,000 promissory note referred to in Count I to Barnett with an allegedly unauthorized signature of Helms' and Count VI charged the same with respect to the submission of the loan guarantee referred to in Counts II and III. Whether Helms authorized the placement of his signature on these two documents was central to all counts except Count IV. The trial judge acknowledged that Helms was the key witness.

In case 764, the Petitioner was charged with a single count of false swearing of a non-identity affidavit.

1. *Ineffective Assistance of Counsel*

On Nov. 26, 1985, approximately 14 months prior to trial, the court appointed counsel to represent Petitioner. In the more than 13 months that he represented Petitioner before trial, appointed counsel never interviewed any potential witnesses. His telephonic communications with Petitioner were limited to two calls and a third call just five days before trial, in spite of Petitioner's efforts to the contrary in the 13 months. Apx. 10a-13a. Appointed counsel had one 45-minute meeting with Petitioner during the 12 months preceding trial.

Shortly after his appointment, the government sent a notice to appointed counsel inviting him to review the voluminous documentation located in West Palm Beach and advising him that the government would "use, at trial, documents related to 74 loan transactions". Gov. Standing Discovery Response, Dec. 14, 1985.

Between the time of his appointment and the end of December, 1986, approximately 13 months later, appointed counsel filed only two procedural motions. The first was filed in December of 1985 requesting a 4-5 month continuance citing his need to review the files of Petitioner's previously retained counsel (which was never done). The second motion was filed in October of 1986 requesting more time to file motions.

From January, 1986 through December, 1986, Petitioner attempted "countless times" to communicate with appointed counsel with regard to his lack of attention to these cases. Appointed counsel refused to speak to Petitioner or return any of his telephone calls. Apx. 10a.

At the Dec. 3, 1986, status conference, appointed counsel gave the impression that he had only taken the case as a favor to the magistrate, that the magistrate was up in Maine laughing and that he wanted out of the case. 1SR2:16.

On Jan. 12, 1987, appointed counsel met with Petitioner for approximately 45 minutes at which time he advised him that this was a "simple case" and that the Government could not introduce evidence or testimony regarding any bank other than the two banks in Florida. Apx. 12a.

On Jan. 14, 1987, (two weeks before the scheduled trial date) at the final pre-trial conference, appointed counsel complained that the Government was *now* "going up and down the Eastern Seaboard . . . as opposed to just sticking with the two banks in Florida". ISR3:17. And though he did not agree with this strategy, he should at least look at what was characterized by the government as a room-full of documents that could only be transported by truck. It is undisputed that appointed counsel never reviewed any of the voluminous documents in West Palm Beach. From this transcript it is apparent that the trial judge learned on Jan. 14, 1987, 2 weeks before trial, that appointed counsel had just discovered the complexity of the case and the amount of documents to be reviewed. Among the documents never reviewed were the interbank memoranda of Barnett citing Helms' knowledge of the Barnett loans and FBI Agent Cavanaugh's false statements to the bank. Apx. 27a-35a. The first and only pre-trial motions filed by appointed counsel, other than the two procedural motions described above, were filed on Dec. 31, 1986, the final date for filing motions extended by the court. The motions were pre-typed form discovery motions with Petitioner's named inserted. None of them cite any fact unique to the Petitioner's case.

On Jan. 27, 1987, seven days before the scheduled trial date, appointed counsel called Petitioner and advised him the Government was going to introduce evidence involving all banks outside of Florida, contrary to his statements at their prior meeting. Appointed counsel advised Petitioner that he thought this was bad law, and his belief was that it "stinks". Apx. 12a. When Petitioner questioned appointed counsel as to how he could possibly be prepared, appointed counsel advised Petitioner that if he did not like the way his case was being handled that he, Petitioner, should write a letter to Judge Spellman. Appointed counsel never met or spoke to Petitioner again until minutes before the trial began.

Because of these circumstances, Petitioner wrote and sent the Feb. 3, 1987 letter to Judge Spellman, and received no response. Apx. 10a.

On Feb. 9, 1987, the first day of trial, the trial judge, without the prior knowledge of Petitioner, met with appointed counsel and the prosecutor in chambers for an unrecorded discussion of Petitioner's Feb. 3 letter.

At the conclusion of the meeting in chambers, the trial judge, appointed counsel and the prosecutor entered the courtroom whereupon the judge announced, on the record, that he had discussed the contents of Petitioner's letter with appointed counsel and with the government attorney and that he had concluded that appointed counsel was prepared. Apx. 14a-15a.

The trial judge never discussed with Petitioner, on or off the record, the allegations in his Feb. 3, 1987 letter; nor has any evidence been offered to controvert any of the statements made in that letter at any time. Appointed counsel never made any statement on the record at any time to indicate that he was ready for trial. Post-trial motions for an evidentiary hearing were filed with the district court and the 11th Circuit. Both were denied.

2. ***Governmental Misconduct***

The indictment and convictions are based on testimony of Helms and Agent Cavanaugh before the Grand Jury

and at trial which the Government knew was false. The false statements and testimony are set out in the chronology below:

October 14, and December 20, 1982: Barnett loans taken out in the name of Helms and Petitioner in the amounts of $350,000 and $150,000 respectively.

January, 1983: George Wilde, a Barnett official, telephoned Helms in Washington and discussed Helms' Barnett loan with him.

April 29, 1983: John Duane ("Duane"), Chairman of the Board of Barnett, and James LeBlanc ("LeBlanc"), Security Officer of Barnett communicated with Agent Cavanaugh and, with a 1979 FBI investigation report in his possession, Cavanaugh reported to them that the Appellant 1) had been indicted in Sacramento (false); 2) declared personal bankruptcy in California (false); and, 3) falsified a yacht appraisal allegedly causing Chase Manhattan Bank to lose $400,000—$500,000 (false). Apx. 27a. (These unfounded allegations were asserted against the Petitioner in a civil suit in which Petitioner prevailed and was awarded $47,000. The 1979 FBI confidential files in Cavanaugh's possession directly contradicted these false statements.) The AUSA in California and the FBI Special Agent in Charge had previously determined that the allegations were without foundation. Apx. 36a-39a.

May 4, 1983: Agent Cavanaugh met with Wilde and quoted excerpts from the contents of the FBI files in his possession. Wilde reported that he was upset to see bank documents in Cavanaugh's file. Apx. 31a. No subpoenas had been issued. Cavanaugh also advised Wilde that the fraud charges against Petitioner had been *nolle prossed* (more than ten years before in Pennsylvania). See *infra*, June 14, 1983.

May 5, 1983: The bank called the Helms-Roggio loan due to information provided by the FBI. Wilde and an attorney for the bank met with Helms personally in Helms' Washington office at the FAA and handed him

a demand letter for his loans and Helms indicated that he would take care of the matter.

May 19, 1983: Helms advised two FBI agents that, in all probability, he had signed the Barnett loans. Apx. 21a.

May 23, 1983: Helms filed his Federal Financial Disclosure report with the Department of Transportation certifying, as correct, that his liabilities included one-half of the two Barnett loans of $150,000 and $350,000 and 20% of the Flagler property.

June 14, 1983: Cavanaugh testified before the Grand Jury and falsely stated that the Petitioner had been *convicted* of fraud in Pennsylvania. (39 days after Cavanaugh told Wilde that those charges had been *nolle prossed* in their May 4, 1983 meeting, *supra*, and no curative instruction was given by the prosecutor.) The Petitioner had no convictions previous to the instant case.

August 2, 1983: Wilde testified before the Grand Jury. When asked twice, Wilde testified that there had been no undisclosed liabilities to Barnett. However, the Government elicited testimony from Wilde to the effect that if he had known about the alleged Chase loan problem (which did not exist) and the alleged personal bankruptcy problem, (which did not exist) Barnett would not have extended credit to Petitioner. Cavanaugh was the source of both false allegations.

September 22, 1983: Two FBI agents showed the two Barnett loan notes to Helms and when asked if the signatures were his, he advised that they were not. Helms was asked whether he had recalled giving Petitioner authority to sign his name. Helms said that he could have, but did not specifically recall. Apx. 25a.

November 26-27, 1983: According to Helms' sworn testimony before the Grand Jury and at trial, this is the date that Helms claims he *first* learned that the Barnett loan obligations were in his name.

January 3, 1984: John Duane, Chairman of Barnett, repeated, before the Grand Jury, false information given to him by Cavanaugh that Petitioner had been indicted in California, had filed for personal bankruptcy in California and had falsified a yacht appraisal. The Grand Jurors were led to believe, by the Government, that these false statements were true.

January 14, 1984: Helms testified before the Grand Jury that he never authorized any one to sign his name, except on three specific occasions. (He told the FBI on Sept. 22, 1983, that he had given the authority to Petitioner 6-8 times in the past.)

July 10, 1984: Wilde testified again before the Grand Jury. Even though 11 months had transpired between Wilde's two Grand Jury appearances, the Government never corrected Wilde with regard to the false information supplied to him by Cavanaugh. Instead, the same testimony was elicited from Wilde again before the same Grand Jury. Before the Grand Jury, Wilde was read a list of alleged liabilities totaling $5 million. The list came from a computer printout generated by Cavanaugh marked as Grand Jury Exhibit Wilde-2. The government, with full knowledge of Wilde's earlier testimony of no undisclosed liabilities, manufactured this list. It is undisputed that none of the $5 million in liabilities was the Petitioner's. More important, the Government "lost" this important Grand Jury Exhibit before trial.

Morrison of Pan American was also asked questions based on Wilde-2 before the same Grand Jury. Wilde and Morrison are the only two, besides Cavanaugh, who testified about Petitioner's financial statements, using Wilde-2 as documentary evidence.

August 7, 1984: Cavanaugh testified falsely before the Grand Jury that, according to his calculations Petitioner had failed to disclose more than $10 million in liabilities excluding roll-over loans. Cavanaugh could not substantiate any of this claim with two separate chances to do so at trial.

All of this information and these documents were in the possession of the FBI and the prosecutors before Petitioner was even indicted.

Robert Drumheller, Early Gilbert, Charles Ascenzi, Neil Peterson, Esq., and Colleen Mahoney, all former Devon employees, and all government witnesses (three with government immunity), totally contradicted Helms at trial as to his knowledge of loans and his signature authorization practices.

The Case 8069 indictment charged Petitioner with failing to report additional debt which was acquired *after* the date reflected on Petitioner's financial statements which were submitted to lending institutions. Count I.6. It was treated as a major issue before the Grand Jury. All of Cavanaugh's testimony relating to the alleged $10 million in undisclosed debt, *supra*, Aug. 7, 1984 (which was never substantiated in any way) was offered by the Government in an attempt to prove that Petitioner had failed to report these liabilities in violation of the law. The government proceeded with this theory through opening statements at trial and on into the trial until confronted by the judge as to the impropriety of the legal theory whereupon the Government abandoned its theory.

The government's position at trial:

> "THE COURT: . . . What is the obligation—what is the obligation of a borrower to, in fact, go back to a bank that he has already borrowed money from and owes and say, 'Hey, and by the way, I borrowed a hundred thousand dollars more last week'? There is nothing in the law that requires that.
>
> MS. HECK: Your Honor, I think that you really overlook the whole notion of material omissions. If, in fact, at a time when Mr. Roggio—
>
> THE COURT: Omissions occurred when he got the loan.
>
> MS. HECK: But that is not when the fraud is complete, Your Honor. The fraud continues through the time that the banks are being deceived.

THE COURT: What bank? Barnett? Pan American?

MS. HECK: What I call the victim banks, yes, sir.

THE COURT: Let me understand what your position is.

Are you suggesting that the law requires a borrower to, in fact, continually update and bring to the attention of a bank that doesn't even ask for it?

MS. HECK: If it is part of a scheme to defraud.

THE COURT: No." 1SR24:2834.

When the government abandoned this theory mid-trial, it effectively amended the indictment with respect to Counts I, II, III and IV.

The Petit Jury was instructed to read the indictment as drafted. The abandoned theory set forth in paragraphs 1.6 and 4 of the indictment was incorporated in Counts II and III.

With respect to Petitioner understating his liabilities, Counts I and IV charge that the respective amounts reported by Petitioner were $1,705,000 (GX2), $5,350,000 (GX12), and $3,000,000 (GX14) and the three financial statements, which were given to the alleged victim banks, on their face, report liabilities of $6,963,000, $32,600,800 and $20,117,850. The allegations in the indictment overlooked the addition of the liabilities on the second page to the liabilities on the first page and note 6 on the subsequent page of each financial statement.

3. *Violations of Brady v. Maryland*

The Petitioner was charged in Count I, para. 5.C. and 5.E of the Case 8069 indictment (which was incorporated into Counts II and III) with causing the submission of a personal financial statement containing false information to the effect that he and Helms owned interests totalling 87% ownership in Miami investment land as of December 31, 1981 and June 30, 1982. In response to questions by the government at trial, Helms testified that he and Pellegrino each owned a ⅓ interest up to

May of 1983. In response to questions by the government, Pellegrino testified that he retained a ⅓ interest up to September, 1983.

Because of continued threats of imminent indictment unless he cooperated with the government, the Petitioner's accountant was instructed by his counsel not to communicate with the Petitioner before or during the trial. In a conversation with the Petitioner after the trial, the accountant advised the Petitioner that he had had numerous arguments with both Agent Cavanaugh and the prosecutor regarding where, when and how the percentage ownership reduction took place. The accountant also advised the Petitioner that he had advised Agent Cavanaugh and the Prosecutor that he was physically present at a meeting with Pellegrino sometime before June of 1982 at which Pellegrino agreed to the change in the ownership and that he had provided the government, through his counsel, with a photocopy of a document to substantiate this claim.

At trial, even after granting immunity to the accountant, the government never asked the accountant about the meeting he attended or the specific date of the reduction in ownership which would have contradicted the indictment and two of its other witnesses, Helms and Pellegrino. Nor did the government produce the document furnished by the accountant's counsel to the Petitioner until after the trial. The court, at trial, specifically requested the prosecutor to retrieve that copy from its offices and to provide it to the Petitioner. The government failed to do so. In her closing argument, the prosecutor specifically advised the jury that the testimony of Helms, Pellegrino, and the accountant was clear and uncontroverted by the documents.

4. *Mail Fraud*

Count I alleges a scheme to defraud financial institutions which allegedly began in May of 1981, continued for 2½ years, involved the borrowing of more than $70

million and relied on a single mailing of an unsigned promissory note for $150,000 in December 1982 to Barnett Bank. Count I charged the Petitioner with causing this blank promissory note to be mailed from Barnett Bank to his office in Pennsylvania.

Of the six count indictment in Case 8069, the three alleged mailings (Counts I, II and III) took place within a span of 45 days. In the scheme alleged by the government in this case, no mailings occurred for 19 months (from the date the alleged scheme began on May 1, 1981 to December, 1982) at the beginning and for 11 months (January, 1983 to December 1983) at the end of the alleged scheme.

Counts II and III are based on the mailing of a Helms guarantee in connection with a promissory note, executed by the Petitioner, to Pan American Bank for $500,000.

The Promissory note to Pan American Bank was dated January 11, 1983, and funded the same day. The mailing of the guarantee took place 13 days later and this, along with its return to Florida, were the last two mailings alleged in the indictment.

While the indictment recites that the Petitioner and Helms borrowed in excess of $70 million, the Petitioner was charged only with obtaining the Barnett Bank loans and the Pan American Bank loan by fraud, totalling $1 million. The government admitted that it did not believe that most loans made to the Petitioner and Helms were based on false representations.

William Morrison, the bank officer at Pan American Bank, testified that the loan was funded without any guarantees because the bank did not "typically" rely on the guarantors but the borrowers themselves. 1SR5:110. The Pan American loan was in the Petitioner's name alone.

5. *Jury Instructions*

Just after the trial judge had seated the jury for the purpose of instructing them prior to their deliberations

and moments before the jury instructions were read the court said:

> "THE COURT: . . . 110 was offered into evidence by Mr. Helms and it was his desk calendar for the page of this particular date on 104 indicates that he could not have signed it on that date because he was someplace else and not in the state of Pennsylvania.

During deliberations, the jury sent out a question asking if they had to agree that Helms' signature was signed without apparent authority to return a guilty verdict. Apx. 8a.

6. *Speedy Trial—Facts*

At the May 22, 1986 status conference, the trial court, *sua sponte*, continued the two cases without any ends-of-justice analysis or findings required by the Speedy Trial Act to create excludable time. In Case 764, no waiver of speedy trial was ever filed and no motions were pending before the court from the date that the Petitioner first appeared before a judicial officer, October 11, 1985, until October 14, 1986, 368 days later. The trial court mistakenly thought that the two cases had been consolidated (May 26, 1986 Status Conference, p. 4); however, they were not consolidated until the morning of trial.

Appointed counsel, who had sole responsibility pre-trial, never filed a speedy trial objection as required under 18 U.S.C. § 3162. No matter how it is calculated there were more than 400 non-excludable days under 18 U.S.C. § 3161 in Case 764 and more than 500 non-excludable days in Case 8069.

REASONS FOR GRANTING THE WRIT

I. The Petitioner Was Denied the Effective Assistance of Counsel

The 11th Circuit Panel Opinion (the "Opinion") attempted to summarily dispose of Petitioner's pre-trial ineffective assistance of counsel claims by concluding that, "We see no evidence in the record to indicate that

the district judge was incorrect. . . ." Apx. 4a, referring to the trial judge's equally summary conclusion that Petitioner's court-appointed counsel had provided "complete and more than adequate preparation of your (Petitioner's) case which, very frankly, is not the criteria required under the Eleventh Circuit." Apx. 15a.

The Petitioner respectfully asserts that his February 3, 1987 letter is the record and is uncontroverted. A simple perusual of the docket sheets and the pre-trial transcripts will reveal, without any exceptions, that no substantive motions were ever argued, that appointed counsel never wrote or made any statement, at any time, to suggest that he had any familiarity with the facts unique to Petitioner's case, or that any of the statements in the Petitioner's February 3 letter were exaggerated or untrue.

Contrary to the Opinion, it remains undisputed that appointed counsel interviewed no witnesses, refused to communicate for 11 months pretrial with his client, failed to review important documents in West Palm Beach, failed to review prior counsel's files, met with Petitioner for a total of two and one-half hours in more than 14 months (and no time at all after discovering the size and complexity of the case in mid-January, two weeks before the scheduled trial), filed only a handful of perfunctory form discovery motions on the last day for filing any motions (which had been extended by the court) approximately 30 days before the scheduled trial, and had been proceeding on the false assumption that it would be a simple case involving only two banks in the Southern District of Florida. Likewise, there was no correspondence between appointed counsel and his client.

Conversations between counsel and client are *critical* to determine strategy. *Washington v. Strickland*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

The total communication during the last 12 months before trial was the meeting of approximately 45 minutes.

Even the government added confirmation at the January 14, 1987, final pre-trial conference. It pointed out in response to appointed counsel's complaints about the Government "now going up and down the Eastern Seaboard," that appointed counsel had theretofore only requested copies of statements by the Petitioner and that he did not want or need to review any of the other documents then located in West Palm Beach. (The documents related to transactions with over 15 banks brought out at trial.) This is even after appointed counsel had been put on notice 14 months before that the government intended to use at trial documents related to 74 different loans taken out by, or personally guaranteed by the Petitioner. Over 3000 pages of the government's case were devoted to 15 banks outside Florida whose documents were located in West Palm Beach. Approximately 400 pages of the trial transcript were devoted to the bank transactions in Florida.

The 11th Circuit Opinion completely ignored a central contention of Petitioner that his exclusion from the unrecorded in-chambers meeting with the judge, the prosecutor, and his attorney just before the beginning of trial violated his due process rights.

In *Kentucky v. Stincer*, the Court wrote:

> ". . . a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." 107 S.Ct. at 2667.

The Court also wrote:

> "The Court has assumed that, even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *Snyder v. Mass.*, 291 U.S. 97, 105-106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934)"

It is difficult to imagine a more critical stage of the proceedings than a meeting regarding a defendant's specific and detailed complaints about representation by counsel attended by the government, the trial judge, and the counsel about which he has complained. When the trial judge questioned appointed counsel about his preparedness without Petitioner's knowledge, Petitioner was denied his 6th Amend. right to counsel.

The unrecorded meeting in chambers prevented the Petitioner from expressing his substantial uncontradicted concerns, thus denying him his right, as described in *Stincer*, to be present at a critical stage when his presence would have contributed to the fairness of the procedure.

In *U.S. v. Young*, 482 F.2d 993 (5th Cir. 1973), the court held that it was reversible error for a trial judge not to pursue thorough inquiry into the source and factual basis of defendant's complaint.

In *U.S. v. Woods*, 487 F.2d 1218 (5th Cir. 1973) the court made it clear that the trial judge has a responsibility to make inquiry *of the defendant* and appointed counsel concerning a defendant's claim of lack of preparation. Other courts have been consistent.[1] The Opinion is in conflict with these other Circuits.

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[1] *Sawicki v. Johnson*, 475 F.2d 183 (6th Cir. 1973) (Thorough investigation of defendant's allegations required.); *U.S. v. Morrissey*, 461 F.2d 666 (2d Cir. 1973) (Perfunctory inquiry into truth and scope of defendant's allegations without more constitutes reversible error.); *U.S. v. Seale*, 461 F.2d 345 (7th Cir. 1972) (Failure to inquire into basis of defendant's dissatisfaction with counsel is abuse of discretion.); *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970) (Trial court obligated to conduct inquiry necessary to ease defendant's dissatisfaction, distrust, and concern for accuracy of court-appointed counsel's representation.); and, *Monroe v. U.S.*, 389 A.2d 811 (D.C. App. 1978) (6th Amend. imposes affirmative duty on trial court to conduct inquiry into defendant's pre-trial allegations of counsel's lack of ability or preparedness. Inquiry must be on record and findings of fact must be sufficient to permit meaningful appellate review.) *U.S. v. Padilla*, 819 F.2d 952 (10th Cir. 1987) (District Court should make formal inquiry

The Court has admonished that "judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed. 2d 763 (1970).

Also see *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), and *Johnson v. Zerbst*, 204 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

A. *The Petitioner Never Waived His Right to Counsel*

It was only when confronted with the prospect of what turned out to be a 10½ week trial (approximately 7 weeks of which was the government's case) with counsel who had just discovered the size and complexity of the case that Petitioner complained in his letter to the trial judge on February 3, 1987, before the trial. Petitioner did not ask for a delay in the trial; rather, he requested that the trial judge take whatever steps were necessary to ensure that he was receiving an adequate defense and a fair trial.

The Petitioner asked if he was permitted to represent himself after he learned that the trial judge was not going to do anything with regard to the claims made in his February 3, 1987 pretrial letter. The Petitioner was asked:

> "THE COURT: Is the decision on your part a free and voluntary one?
>
> DEFENDANT ROGGIO: As to the circumstances, yes.
>
> THE COURT: From the standpoint of your decision, *other than how you perceive the situation*, are you, in fact, or have you, in fact, been threatened or coerced into this position, this decision? (emphasis added)

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into defendant's reasons for dissatisfaction with present counsel and court should question defendant as long and as thoroughly as the circumstances of the case demand. Court also held that a defendant forced to choose between incompetent or unprepared counsel and appearing *pro se* faces a dilemma of constitutional magnitude.)

DEFENDANT ROGGIO: Coerced? No. Put in this situation, yes." Apx. 19a.

The Petitioner never made any statement to the effect that he waived his right to counsel.

This could hardly be construed as an intelligent knowing waiver of his 6th amend. right to counsel. The trial judge clearly recognized that the Petitioner perceived the situation to be either representing himself or submitting to totally unprepared counsel yet he still refused to investigate the Petitioner's complaints on the record.

The trial court's admonition to the Petitioner about the risks of self-representation was an empty gesture, of use and relevance only where a defendant freely and voluntarily chooses to give up his right to counsel.

In *Sanchez v. Mondragon*, 858 F.2d 1462 (10th Cir. 1988) the court held that a defendant's choice to proceed *pro se* cannot be voluntary in the constitutional sense when the defendant is faced with the choice between incompetent or unprepared counsel and appearing *pro se*.

The Opinion, in declaring that the Petitioner "insisted" in representing himself under these facts, is both factually inaccurate and in conflict with the other circuits. See footnote 1, *supra*, p. 16. Moreover, it merely repeats the government's brief below which is completely unsupported by the record. The prejudice is obvious in that the Petitioner was forced to defend himself throughout trial.

Even without prejudice, this case was brought within that class of cases recognized by the Court, where no showing of prejudice was required, because the trial court had interfered with the Petitioner's right to effective assistance of counsel.[2]

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[2] *Geders v. U.S.*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (bar on attorney-client consultation during the overnight recess); *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 45

In this case, the court interfered with the ability of the defense to make independent decisions about counsel—and thus about how to conduct the defense.

In an application of the *Strickland* standard—i.e., 1) that "counsel's performance was deficient" and 2) that "the deficient performance prejudiced the defense," 466 U.S. at 687, 104 S.Ct. at 2064, the second leg of the test becomes an exercise of the obvious. There is no way that the failure to interview witnesses, to communicate with the client, or to review documents along with the other undisputed failures of counsel could be evaluated for the possibility of falling within the "wide latitude counsel must have in making tactical decisions". *Id.*, at 686, 104 S.Ct. at 2063.

In *Strickland*, the Court wrote:

> Ultimately, the courts are concerned that counsels' decisions reflect "informed, professional deliberation" rather than "inexcusable ignorance or senseless disregard of their clients' rights." 693 F.2d at 1251.

Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067. From the point in time that the Petitioner was forced to represent himself, he was without counsel and that conclusion, alone, should nullify the events that followed including the trial and convictions.

L.Ed.2d 593 (1975) (bar on summation at bench trial); *Brooks v. Tennessee*, 406 U.S. 605, 612-613, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972) (requirement that defendant be first defense witness); *Ferguson v. Georgia*, 365 U.S. 570, 593-596, 81 S.Ct. 756, 768-770, 5 L.Ed.2d 783 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," *Cuyler v. Sullivan*, 446 U.S. 335 at 344, 100 S.Ct. 1708, at 1716, 64 L.Ed.2d 333 (1980). *Id.*, at 345-350, 100 S.Ct. at 1716-1719 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective)." *Id.*, at 686, 104 S.Ct., at 2063-2064.

B. *Petitioner was Denied Effective Assistance of Counsel With Regard to the Assertion of His Speedy Trial Rights*

The Opinion does not address the fact that when the trial court intimidated appointed counsel at the Jan. 14, 1987 pretrial conference into not raising speedy trial, (Apx. 20a) the court was interfering with the Petitioner's right to counsel in the same manner as that found constitutionally impermissible in *Geders* and the cases referred to in footnote 2, p. 18, *supra*. In acceding to the court's improper interference, counsel breached the duty of loyalty owed his client as well as the "overarching duty to advocate the defendant's cause". *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065.[3] The trial court clearly created a conflict of interest between appointed counsel's duty to his client and his own personal and professional interest in not offending the trial judge. *See Cuyler v. Sullivan*, *supra*, p. 19.

Congress intended that the requirement of a pre-trial motion for dismissal under 18 U.S.C. § 3162(a)(2) would insure that the trial court was alerted timely. In this case, everyone except the Petitioner had been alerted to the speedy trial problems. The trial judge actually ordered the Petitioner (which was not done, the Petitioner was not even aware of it) to execute another waiver in Case 8069 approximately 4 months before the trial after the only waiver executed by the Petitioner, if ever effective at all, had expired. (No waiver was ever executed in Case 764 and the cases were not consolidated until the day of trial.) Since there was no communication between Petitioner and appointed counsel at that time, the Petitioner was never even made aware of the order.

The Opinion stands for the proposition that no matter how egregious the violations of the Speedy Trial Act, a

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[3] See also *Jones v. Barnes*, 463 U.S. 742, 103 S.Ct. 3308 (1983) Brennan, J., dissenting) ("To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court.")

district judge can circumvent the Act with full pre-trial knowledge of the violations by intimidating counsel into not raising the issue or relying on an ineffective counsel who has failed to file any substantive motions including a § 3162(a)(2) motion.

II. The Petitioner Was Denied His Fifth Amendment Right to Due Process Because of the Documented Governmental Misconduct

The Petitioner suggests that the nature and extent of the documented governmental misconduct in this case warrants consideration as a grave matter of public policy.

The government in this case demonstrated a reckless disregard for the truth and a willingness to overlook the false testimony of key government witnesses as well as exculpatory documents. The misconduct is central to the Case 8069 indictment, particularly the willingness to overlook Helms' false testimony which went to five of the six counts. See ABA Standard 3.6B.

The question presented is whether the misconduct substantially influenced the Grand Jury's decision to indict. *Bank of Nova Scotia v. U.S., supra.*[4] The 11th Circuit Opinion did not address this issue at all.

The Grand Jury would not have indicted the Petitioner if it had known that none of the mysterious $10 million appearing in Counts I and IV (also incorporated in Counts II and III) allegedly not reported to the victim banks existed; that none of the fictional $5 million elicited from an unwitting Wilde (Barnett official) was the Petitioner's liabilities except on the document manufactured, then "lost" by the government (part of the alleged scheme to defraud banks, substantially influenced Count I then

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[4] Justice Kennedy in *Bank of Nova Scotia v. U.S.*, adopting language in the concurring opinion of Justice O'Connor in *U.S. v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938 (1986), wrote: ". . . if it is established that the violation substantially influenced the grand jury's decision to indict" or there is "grave doubt" that the decision was free from the substantial influence of such violations, dismissal is appropriate." 108 S.Ct. at 2374.

incorporated into Counts II and III); that the government had Helms' financial disclosure report admittedly signed and certified by him reflecting both the Barnett loans and his true ownership in Flagler (substantially influenced all counts except IV); that the government had extensive internal memoranda from Barnett which clearly showed the information provided by Agent Cavanaugh and Helms' knowledge of both loans (substantially influenced all Counts except IV); that the government had in its possession two separate confidential FBI reports which clearly demonstrated Helms' authorization practices and his knowledge of the Barnett loans (substantially influenced all counts except IV); that the Petitioner had never been convicted of fraud or any other crime prior to the instant case (substantially influenced all counts); or, that the Petitioner's not reporting after-acquired debt to the bank was not, in fact, a criminal offense (substantially influenced Count I which was incorporated into Counts II, III and IV).

At this point, it is clear that the Grand Jury based the indictment on false testimony and misleading documentation. The Petitioner respectfully suggests that the Opinion misapplies the law in adopting the position that he was required to have moved for dismissal before trial in order to obtain redress on appeal, especially in the face of Petitioner's substantial pre-trial ineffective assistance of counsel claims. Neither *Mechanik* nor *Bank of Nova Scotia* suggest that requirement in this kind of case. The Petitioner never received the grand jury transcripts or confidential FBI reports until after trial began nor any of the other documents; nor could he have anticipated all of the testimony which contradicted Helms' trial testimony regarding his loan knowledge and signature authorization practices. Most important, the government allegedly "lost" this critical grand jury exhibit Wilde-2. At trial, in regard to its loss the court said that it created a serious deficiency in the record.

These are hardly technical Rule 6 violations to be weighed against the cost of retrial. The 11th Circuit

Opinion sanctions any governmental misconduct as long as the government is successful in preventing its disclosure until the trial begins.

Further, the Petitioner respectfully suggests that a *Mechanik* analysis cannot be applied to a case involving a *pro se* defendant whether he was forced to represent himself or not.

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 462 (1975), prevents a *pro se* defendant from complaining that the quality of his own defense amounted to a denial of effective assistance of counsel. It does nothing more than that. *Faretta* does not stand for the proposition that a defendant receives a fair trial by going *pro se*. Neither *Mechanick* nor *Bank of Nova Scotia* suggest a rationale for concluding that a trial was fair, because of *Faretta*, to justify the suspension of the proper exercise of a court's supervisory responsibility over the grand jury process.

III. The Petitioner's Fifth Amendment Right to Due Process Was Violated by the Government's Suppression of an Exculpatory Document and Information Contrary to *Brady v. Maryland*

The suppressed information contradicted the government's two key witnesses when Petitioner's ownership in the Florida property increased with Helms to 87% and directly negated the allegations in the indictment. There is a more than reasonable probability that had the evidence been disclosed to the Petitioner, the result of the proceeding would have been different. *U.S. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985). The main use by a prosecutor of perjured testimony to obtain a conviction and the deliberate suppression of evidence that would have impeached and refuted the testimony constitutes a denial of due process. *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340 (1935). The reasoning of the Court was that "a deliberate deception of court and jury by the presentation of testimony known to be perjured" is inconsistent with "the rudimentary demands of justice". *Id.*, at 112,

55 S.Ct. at 341. See also *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959), and *Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763 (1972).

In a clear violation of *Brady*, the accountant brought the document to trial and produced it to the government, yet when the court asked the prosecution to provide a copy to the Petitioner the copy from the office, it was not done. For the government to argue in closing, that which they know is untrue, is fundamentally unfair and a violation of due process.

IV. The Eleventh Circuit Opinion Never Addressed the Tenuous Connection Between the Alleged Fraud and the Mailings

The Opinion, by virtue of no comment, endorses convictions which are in conflict with this Court's interpretations of 18 U.S.C. § 1341 in *U.S. v. Lane*, 474 U.S. 438, 106 S.Ct. 725 (1986); *Kann v. U.S.*, 323 U.S. 88 (1944); *Parr v. U.S.*, 363 U.S. 370 (1960), and *U.S. v. Maze*, 414 U.S. 395 (1974).

In the recently decided *Schmuck v. U.S.*, No. 87-6431, slip op. (March 22, 1989), the receipt of an automobile title which was routinely sent through the mail was a prerequisite for completing the resale. In this case, the Helms guarantee was not a prerequisite at all as to the Pan American Bank loan. The mailing in the instant case was not "incidental" to the success of any scheme as described in *Schmuck*, because the loan was not funded on the strength of the guarantee but on the strength of the borrower himself, in this case the Petitioner alone. The guarantee was unnecessary. It was not integral to the loan and it could not have been integral to any alleged scheme to defraud. At that point in time, the Petitioner could have torn up the guarantee, or provided some explanation to the bank as to why it had not been provided. Morrisson testified that it would only have made a difference if he had not received suitable explanations had the guarantee not been furnished at all.

There was no fraud even alleged by the government to have occurred in connection with the underlying loan on January 11, 1983, the date the promissory note was signed and the funds were received by the Petitioner from Pan American Bank. Without proof of an underlying scheme to defraud, there can be no conviction under 18 U.S.C. § 1341.

There is no evidence that the Petitioner specifically caused the mailings or could have forseen the use of the mails when the evidence demonstrated that he had borrowed approximately $70 million during this period without the use of the mails. The senior lending officer at Barnett Bank, George Wilde, testified before the grand jury that it was the Petitioner's practice either to hand carry the documents or use Federal Express. As such, the mailings were not "incident to an essential part of the scheme". *Schmuck, supra* at p. 6, citing *Pereira v. U.S.*, 457 U.S. 1 (1954) nor were the mailings "a step in the plot". *Badders v. U.S.*, 240 U.S. 391, 394 (1916).

With respect to Counts II and III specifically, the mailings afforded no benefit to the Petitioner nor were they designed "to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place", *Maze*, 414 U.S. at 403, 94 S.Ct. at 650. The government never attempted below to dispute the Petitioner's arguments that the mailings under Counts II and III could not possibly have been "lulling" letters under *Lane*.

As Justice Scalia observed in *Schmuck*, "It is mail fraud, not mail and fraud, that incurs liability". (No. 87-6431, slip op. March 22, 1989, Dissent, p. 2).

V. The Petitioner's Fifth Amendment Right to Due Process Was Violated by the Judge's Comments Just Before the Jury Instructions and Instruction No. 16

The trial judge committed plain, fundamental error in his comments just before he delivered the jury instructions. The trial judge should never have "indicated"

that Helms' signature was false, particularly when referring to exhibits which were never in evidence. The trial judge's statements could not have been made at a worse time: just prior to his instructions to the jury and after he had made it clear that the Petitioner had been precluded from commenting in any way on the excluded exhibits in his closing argument. The trial judge had acknowledged that Helms was the key to the government's case. And whether or not Helms' signature had been authorized or forged went to the heart of Counts I, II, III, V and VI of Case 8069. Under the circumstances, the judges comments were tantamount to judicial notice that Helms' signature had been forged. Especially in a criminal trial, the judges last word is apt to be the decisive word. *Bollenbach v. U.S.*, 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 350 (1946).

Underscoring its importance is the note and question from the jury asking whether they had to agree that Helms' signature was signed without *apparent* authority to return a guilty verdict. Apx. 8a.

The government's proposed response (though no responsive instruction was given to the jury) was:

> "MS. HECK: Your Honor, we had drafted a response to them which basically said as to some counts, yes you do, as to some counts it is irrelevant, as to some counts it plays a role, but it is not required.
>
> THE COURT: Well, does not 16 cover that area?"

Jury instruction 16 was one that had been specifically proposed by the government and was accepted by the court, and did not require knowledge or willfullness by the Petitioner (an element of both § 1341 and § 1014. Apx. 40a.

In re *Winship*, 397 U.S. 364, the court wrote:

> "The due process clause of the 14th amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is

charged.'" See also *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965 (1985).

Since this vital instruction neither required a finding of *mens rea* nor equivalent words the Petitioner's right to due process was violated. Furthermore, instruction 16 appears to put the burden on the Petitioner to prove that he was authorized to sign the only notes and guarantee alleged in the indictment, when in fact his defense was based on Ascenzi's independent authorization to sign these documents, not the Petitioner's. Nor was any instruction given to the jury about what to do if Helms' signature was authorized.

Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depend on discharge of the judges responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy. *Bollenbach*, 326 U.S. at 612.

VI. The Petitioner's Fifth Amendment Right to Due Process Was Violated by Inadequate Notice Under the Indictment and a Broadened Indictment at Trial Not Brought by the Grand Jury

With respect to the three financial statements referenced in Count I of the indictment, the government incorrectly listed the total liabilities on one page of the financial statement without adding the liabilities clearly set forth on the other pages of the same financial statement. The form in which these liabilities were set out was consistent with generally accepted accounting principles and was preferred by the banks because it segmented the assets and liabilities in what would otherwise have been a confusing presentation of the Petitioner's true financial picture.

Due process requires that a defendant be put on proper notice of the charges against him. The face of the financial statements actually reported six times the liabilities charged in the indictment as having been reported

to the banks. There is no dispute that these three statements were the ones submitted to Barnett and Pan American on the three respective dates. The government's treatment below of the $49 million variance as inconsequential ignores the fact that the Petitioner has been convicted even after demonstrating that he had reported liabilities far in excess of the amounts claimed in the indictment and that all liabilities were properly reported to the victim banks. The indictment did not give the Petitioner proper notice.

The conviction for an offense different from that which is included in the indictment violates the 5th amend. grand jury guarantee. After an indictment has been returned, its charges may not be broadened except by an amendment by the grand jury itself. *U.S. v. Miller*, 471 U.S. 130, 105 S.Ct. 1811 (1985).

In *Miller*, the facts proved at trial clearly conformed to one of the theories of the offense contained within that indictment. In the instant case, they did not. The Petitioner was tried on a broadened indictment which was at gross variance with the indictment brought by the grand jury regarding these reported liabilities.

Count I which was incorporated in Counts II and III of the indictment alleges nondisclosure of $10 million in after-acquired debt. The government in its brief below claimed that it no longer pursued this theory at trial but did not point to any alternative theory. More important, the non-reporting of after-acquired debt is not a crime. The government did not attempt through the testimony of any of the victim bank witnesses to illustrate any of the undisclosed $10 million. It could not do so because that debt did not exist. When the Petitioner called Agent Cavanaugh as his witness, the same witness who gave this false information to the grand jury, Cavanaugh could not detail any of the debt even though he was given two separate opportunities.

As to the grand jury's decision to indict, it is impossible and improper at this point for anyone to guess

if the nonexistent $10 million, or the $49 million variance in the financial statements, was the alleged fraudulent element in its mind associated with the charged violation of § 1341.

Count I was incorporated into Counts II and III thereby tainting all three counts.

VII. The Petitioner's Right to a Speedy Trial Was Violated

The four factors listed under *Barker v. Wingo*, 407 U.S. 514 (1972), favor the Petitioner.

The length of delay was seven times the 70-day period in Case 764 and almost 13 times the 70-day period in Case 8069.

As to the reason for the delay, the Opinion was in error in claiming that the delay was the result of the Petitioner's conduct. The trial dates were set to accommodate the trial court's congested calendar, the pregnancy of an Assistant U.S. Attorney who never tried the case anyway, and the trial schedule of the prosecutor who did try the case. March 14, 1987, Pre-Trial transcript. In Case 764 not a single continuance was requested by the Petitioner.

The Opinion appears to address only 6 months out of the 30-month delay in Case 8069, ignoring the 24 months remaining, and fails to address Case 764 at all.

With respect to prejudice to the Petitioner, it must be noted that George Wilde, Senior Lending Officer of Barnett Bank, the most important defense witness, died 6 months before trial. In *Barker v. Wingo*, the court made it clear that when witnesses die, the prejudice is obvious.

Wilde testified before the grand jury that 1) Helms knew of his personal obligation to Barnett, directly contradicting the allegations in the indictment; 2) the Petitioner had no undisclosed liabilities; 3) that it was the Petitioner's practice to use Federal Express or hand-carry documents, and not to use the U.S. mails. Wilde

was falsely led to believe and testify before the grand jury that $5 million in undisclosed liabilities existed when they did not. Wilde would have contradicted Agent Cavanaugh.

The failure of the trial court to conduct an "ends-of-justice" analysis while, *sua sponte*, continuing the cases for eight months was a clear violation of 18 U.S.C. § 3161(h)(8)(A).

CONCLUSION

The Supreme Court is not the court of last resort in terms of an appellant's automatic right to appellate relief. For this reason it is incumbent upon the circuit courts to review fully and address the issues raised by an appellant, especially in a criminal case where liberty interests are at stake. Where a circuit court fails in this respect, it becomes a burden on the Supreme Court suggesting the necessity of the exercise of its supervisory responsibility over the circuits.

The Eleventh Circuit Opinion in the instant case has failed to address so much of what was raised below that, the Petitioner respectfully suggests, the failure is tantamount to a denial of due process. This failure has created an additional reason, the Petitioner believes, for the Supreme Court to grant certiorari. For this and the reasons set forth above, the Petitioner respectfully prays that the Court grant certiorari.

Respectfully submitted,

C. ALEXANDER HEWES, JR.
HEWES, MORELLA, GELBAND
& LAMBERTON, P.C.
Suite 300
1000 Potomac Street, N.W.
Washington, D.C. 20007
(202) 337-6200
Counsel of Record

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 87-5694, 87-5695

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VINCENT VICTOR ROGGIO,
Defendant-Appellant.

Jan. 11, 1989

Appeals from the United States District Court
for the Southern District of Florida

Before HILL and JOHNSON, Circuit Judge and NICHOLS *, Senior Circuit Judge.

HILL, Circuit Judge:

I

Following a jury trial, the appellant, Vincent Victor Roggio, was convicted of three counts of mail fraud, in violation of 18 U.S.C. § 1341, three counts of causing materially false statements to be made to federally-

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* Honorable Philip Nichols, Jr., Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

insured banks, in violation of 18 U.S.C. § 1014, and one count of causing materially false statements to be made to a federally-insured savings and loan institution, in violation of 18 U.S.C. § 1014. On appeal, Roggio argues that his statutory and constitutional speedy trial rights were violated by delay of his trial, that he received ineffective assistance of counsel, that the government acted improperly in obtaining an indictment against him, and that the evidence was insufficient to sustain his convictions. Because we find no violation of the appellant's statutory and constitutional rights, and since the evidence clearly supported his convictions, we affirm.

II

We first consider Roggio's speedy trial claims. Roggio was indicted twice, one on August 7, 1984, and a second time on October 3, 1985. Both cases were tried jointly on February 9, 1987. Thus, approximately thirty months passed between the issuance of the first indictment and trial, and approximately sixteen months passed between the issuance of the second indictment and trial. The appellant contends that these delays violated the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* We disagree, however.

According to the statutes: "Failure of the defendant to move for dismissal prior to trial . . . shall constitute a waiver of the right to dismissal under this section." 18 U.S.C. § 3162(a)(2). Here, the appellant failed to move for dismissal of his case based on the length of the delays and therefore waived his rights under the Speedy Trial Act. *See United States v. Henorio-Angel*, 756 F.2d 1505, 1508 (11th Cir.1985) (the defendant's failure to move for dismissal on speedy trial grounds prior to trial waived his right to this sanction under the Speedy Trial Act).

In addition, we find no merit to the appellant's constitutional speedy trial claim. Our analysis is governed by *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972), which mandates that we assess

the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. While thirty and sixteen month delays before trial are by no means trivial, they are nevertheless attributable to the appellant's conduct. For example, between September 1984 and November 1985, delay occurred because Roggio's first attorney, Alexander Hewes, Jr., litigated a series of motions to withdraw as counsel. Hewes also obtained a six month continuance in March 1985 which the government opposed. Moreover, after Hewes finally managed to withdraw in December 1985, and a new lawyer, Eugene Zenobi, assumed control of the defense in both cases, the appellant signed a written waiver of his speedy trial rights in January 1986. The appellant signed the waiver to allow his new lawyer to prepare for this complex fraud trial. In this light, it is clear that the appellant, and not the government, delayed the trial date. Further, the third Barker factor—the defendant's assertion of his speedy trial right—also weighs heavily against the appellant because he failed to assert his right prior to trial. To the contrary, Roggio's written waiver of his speedy trial right evidences an intent to abandon that right in order to obtain more trial preparation time. Finally, we detect no prejudice suffered by the appellant in the delay of his trial. Therefore, we conclude that the *Barker* balancing test indicates that Roggio suffered no impairment of his Sixth Amendment right to a speedy trial.

We next consider the appellant's claim that he received ineffective assistance of counsel from Zenobi. At the outset, we note that the appellant insisted on representing himself during his trial despite repeated admonitions by the trial judge about the consequences of such representation. The appellant clearly had a right to represent himself, but in exercising that right he cannot now complain that he received ineffective assistance of counsel at trial. "[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense

amounted to a denial of 'effective assistance of counsel.' " *Faretta v. California*, 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 2540-41 n. 46, 45 L.Ed.2d 462 (1975). Thus, appellant's claim of ineffective assistance of counsel can only concern his attorney's pretrial preparation of the case which might have prejudiced Roggio's right to a fair trial. In this regard, the district judge examined the quality of Zenobi's pretrial representation of the appellant, and he concluded that the attorney had provided "complete and more than adequate preparation" of the case. We see no evidence in the record to indicate that the district judge was incorrect, and therefore we find that Roggio's claim of ineffective assistance of counsel must fail.

Moreover, we find no merit in appellant's contention that the government acted improperly in obtaining the first indictment. Even if a basis for dismissing the indictment existed, the appellant failed to move for dismissal before trial. More importantly, the petit jury's subsequent guilty verdict means not only that probable cause existed to believe that the appellant was guilty as charged, but also that he was in fact guilty beyond a reasonable doubt. *United States v. Mechanik*, 475 U.S. 66, 70, 106 S.Ct. 938, 941, 89 L.Ed.2d 50 (1986).

Finally, our scrutiny of this case persuades us that evidence clearly supported appellant's convictions.

III

We have reviewed each of the appellant's contentions raised in this appeal and find them to be without merit. The judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5694 c/w 87-5695

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VINCENT VICTOR ROGGIO,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

[Filed Mar. 14, 1989]

Before HILL and JOHNSON, Circuit Judges and
* NICHOLS, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge

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* Honorable Philip Nichols, Jr., Senior Circuit Judge for the Federal Circuit sitting by designation.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Docket No. 84-8069-CR-SPELLMAN

UNITED STATES OF AMERICA

vs.

VINCENT VICTOR ROGGIO,
Defendant.

JUDGMENT AND PROBATION/COMMITMENT ORDER

Counsel

In the presence of the attorney from the government the defendant appeared in person on this date July 29, 1987

☒ WITH COUNSEL Defendant appeared pro se assisted by Eugene Zenobi & Dennis Kainen AUSA's Caroline Heck & Sonia O'Donnell

Plea

☒ NOT GUILTY

Finding & Judgment

There being a finding/verdict of ☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of use of the mail in a scheme to defraud in violation of Title 18, United States Code, §§ 1341 and 2 as charged in counts 1, 2 and 3 of the indictment; and false statement to influence bank loan in violation of Title 18, United States Code, § 1014 as charged in counts 4, 5 and 6 of the indictment.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Docket No. 85-764-CR-SPELLMAN

UNITED STATES OF AMERICA

vs.

VINCENT VICTOR ROGGIO,
Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

Counsel

In the presence of the attorney for the government the defendant appeared in person on this date July 29, 1987

☒ WITH COUNSEL Defendant appeared pro se assisted by Eugene Zenobi & Dennis Kainen—AUSA's Caroline Heck & Sonia O'Donnell

Plea

☒ NOT GUILTY

Finding & Judgment

There being a finding/verdict of ☒ GUILTY.
Defendant has been convicted as charged of the offense(s) of false statement to influence bank loan in violation of Title 18, United States Code, § 1014 as charged in the one count indictment.

Judge Spellman,

Must we agree that the J. Lynn Helms signature was signed without *apparent* authority to return a guilty verdict.

/s/ Bjorn F. Anderson

Mr. Anderson—

We were in receipt of your inquiry which read as follows:

> Must we agree that the J. Lynn Helms signature was signed without *apparent* authority to return a guilty verdict.

While a response was being considered, we received the following communication:

> We have reached a decision.

Can we presume from these two communications that the jury was able to resolve the first inquiry based on the Court's instructions and is prepared to return its verdicts. Please reply in writing and return to Marshall.

Yes Yes

—— No

/s/ Bjorn F. Anderson
Foreperson

/s/ Eugene P. Spellman

[Please docket in 84-8069-CR-EPS]

February 3, 1987

Honorable Judge Eugene Spellman
301 North Miami Avenue, 7th Floor
Miami, FL 33128

Dear Judge Spellman,

I am writing you in regard to Eugene Zenobi, who is my court-appointed attorney in the cases of the United States v. Vincent Roggio (85-764cr-KING/84-8069cr-SPELLMAN).

When Mr. Zenobi was appointed in approximately October of 1985, Mr. Alexander Hewes (my existing council at that time) and I went to see Mr. Zenobi in order to brief him as to the status of these cases and find out what was needed to prepare for my defense properly. Among many things, we informed Mr. Zenobi of the voluminous documentation housed in Mr. Hewes' office in Washington, D.C., indicating that naturally Mr. Zenobi would have complete access to these files and records to construct a proper defense for me as a defendant in these cases.

During the next 13 months, I telephoned Mr. Zenobi countless times yet my only communication was with his secretary, who advised me in August of 1986 that my trial would be held "sometime in early 1987". During the following few months I continued my efforts to reach Mr. Zenobi and, quite frankly, resorted to leaving urgent messages in regard to his disregard of these cases.

In early December 1986, I telephoned and finally spoke with Mr. Zenobi who advised me that my trial date had been set for February 2, 1987 and that I was to call again after the first of the year. When questioned about his preparedness for the trial, Mr. Zenobi responded, "Even you aren't that stupid". I am assuming that he

was suggesting that I am so stupid as to believe that he wouldn't be properly prepared for these cases at the appropriate time.

On January 5, 1987, I telephoned and spoke with Mr. Zenobi and was told to be in his office on January 9, 1987. This was then changed to January 12 because he wanted to attend the Evidentiary Hearing prior to the meeting with me.

I flew to Miami on January 12, and due to a flight delay, I arrived at 12:30 p.m. rather than at our prescheduled appointment time of 10:30 a.m. Due to my delay and another pending appointment which Mr. Zenobi had made, I had approximately 45 minutes in which to discuss these cases. During this discussion, I expressed grave concerns about Mr. Zenobi's preparations, or lack thereof, for my defense. I questioned him as to how a proper defense could be made without his ever investigating the documents and files in Mr. Hewes' possession, (of which according to Agent Cavanaugh there are over seventy thousand documents in this case), without ever speaking to any potential witnesses or without ever speaking to my previous co-defendants' public defender. I was then informed by Mr. Zenobi that this is "a simple case"; his reasoning as related to me being because no evidence from other jurisdictions can be brought into this case and if so, I would be eligible for a new trial. He used an analogy: if you were accused of stealing a hammer from one hardware store, the prosecution is not allowed to incorporate any other stores you could potentially have stolen a hammer from. Upon closing our meeting, we agreed I would send a list of names of people to subpoena for the trial; which I did. I then returned to New Jersey, hoping, yet somewhat doubtful, that Mr. Zenobi's approach would be a correct one.

On January 27, I telephoned and spoke with Mr. Zenobi and was informed of the fact that the trial had

been postponed for one week. I then inquired as to when I should advise my potential witness to be available for testimony, infact at this point I am not sure they had ever been subpoenaed. Mr. Zenobi informed me that he had been told that the prosecution will take approximately 2-2½ weeks to present their case. I again queried how this could be "a simple case". He then, for the first time, indicated that due to the Scheme Theory, the prosecution is able to enter evidence from other jurisdictions and then commented that this is a bad law, infact it "stinks". It appears to me a proper defense to these allegations in other jurisdictions and the allegations in these cases requires the use of documents and depositions which are located in Mr. Hewes' office which of course, to date, have never been seen by Mr. Zenobi.

The following morning I called Mr. Zenobi and left a message. He returned my call and in our conversation I related that I felt he was not in any way prepared for this trial (due to the numerous reasons previously stated). At that time, I was advised that if I didn't like the way my trial is being handled, to write you, Judge Spellman, a letter.

I fully realize that different attorneys prepare for different trials in different ways, however, I cannot conceive of an adequate defense to both my cases without, at least, some documentary research, communication with witnesses and perhaps most importantly, communication with me, the defendant. I do believe that with proper preparation my defense will result in my acquittal and vindication.

In summary, Mr. Zenobi, to my knowledge has spent:

- a total of two hours with Mr. Hewes
- a total of 2 hours and 45 minutes with me, in person and an approximate total of 1½-2 hours in telephone conversations

- I have received no correspondence from him
- no time with potential witnesses
- no time researching records in either Washington, D.C. or Connecticut

Therefore, I respectfully request the court to review this matter and to invoke the proper procedure necessary for the court to be satisfied that I am receiving adequate defense; thus, to insure a fair trial and one that is not likely to be repeated because of this kind of error.

Respectfully,

/s/ Vincent Roggio
Mr. VINCENT ROGGIO

(Pre-Trial Status Conference, Feb. 9, 1987)

[2] THE COURT: United States of America versus Vincent Victor Roggio.

MS. HECK: For the United States, Your Honor, Assistant United States Attorney Caroline Heck, Assistant United States Attorney Sonia O'Donnell.

With me at counsel table is Special Agent James Cavanaugh of the FBI.

MR. ZENOBI: Gene Zenobi for Mr. Roggio.

THE COURT: Mr. Roggio is here and present?

MR. ZENOBI: Yes, sir.

THE COURT: Mr. Roggio, the Court is in receipt of your letter of February the 3rd, 1987. I have not, in fact, shown this letter to either your counsel or to counsel for the Government. I have, in fact, taken the matter up with them, and they are aware of the fact that the contents of the letter indicate your concern that, in fact, Mr. Zenobi has not adequately and properly prepared for the trial of this case.

Your parting statement with regard to the letter, the last paragraph therefor, is:

> "Therefore, I respectfully request the Court to review this matter and to invoke the proper procedure necessary for the Court to be satisfied that I am receiving adequate defense, thus to insure a fair trial and one that its not likely to be repeated [3] because of this kind of error.

"Respectfully," and thereafter is contained your signature.

Are there any matters that you desire to call to the Court's attention that are not contained in the letter?

DEFENDANT ROGGIO: No, sir.

THE COURT: All right. The Court is of the view at this point in time, having observed with regard to this particular case more so than usual, since the Court has met with counsel on more than several occasions and is aware of the number and extent of the documentation from the standpoint of the Government and the amount

of time that Mr. Zenobi has, in fact, devoted to this case thus far, that insofar as the matter is concerned, the Court is of the opinion that he has, in fact, devoted a considerable amount of time with regard to the preparation of this particular case.

The Court is of the view that from the standpoint of the preparation of the case, that there is voluminous documentation that was, in fact, seized from you or your businesses which, in fact, Mr. Zenobi has been over. How one goes about the preparation of a case of this nature is not necessarily in conformity with how one's client might perceive or view the manner in which such preparation takes place.

[4] The Court is very much unconvinced at this point in time that you have not received anything less than a full and complete and more than adequate preparation of your case which, very frankly, is not the criteria required under the Eleventh Circuit.

I am satisfied that, number one, Mr. Zenobi is an outstanding trial lawyer; and, number two, that he has devoted considerable time to the preparation of this case.

I am more than satisfied at this point that he has more than adequately represented you, regardless of how you perceive that situation.

My view of this does not obviously preclude at a subsequent time your calling to the Court's attention after we have in fact proceeded with the trial of this case, more specific assertions with regard to this matter if, in fact, you continue to have the same concerns that you have evidenced in this letter subsequent to the trial of this case.

But at this point, I am more than satisfied that Mr. Zenobi has done an excellent job in the preparation of this case, and I think that will be reflected by virtue of his representation of you.

So the Court is going to set the matter to rest at this point. I will, in fact, make your letter of February 3rd, 1987, a part of the record in this case and order that

[5] the Clerk of the Court docket it so that it is made a part of the record in this case.

We are prepared to go forward with regard to jury selection in this matter—

MR. ZENOBI: Your Honor, the defendant has a statement.

THE COURT: Yes, sir.

DEFENDANT ROGGIO: Am I permitted to defend myself, Your Honor?

THE COURT: Sir?

DEFENDANT ROGGIO: Am I permitted to defend myself?

THE COURT: Are you permitted to—

DEFENDANT ROGGIO: Correct.

THE COURT: To what?

DEFENDANT ROGGIO: Defend myself.

THE COURT: If you, in fact, Mr. Roggio, make the determination, desire to make the determination of representing yourself, the Court will not preclude you from doing so, but will, in fact, require that Mr. Zenobi remain available to you for consulting and to observe and to do all of the things that the Court would have expected of him except that obviously nobody can compel you to, in fact, require that you accept the representations that the Court makes available to you.

[6] So the obvious answer to that is, if you desire to, in fact, represent yourself, the Court will make inquiry of you to make sure that you are alert, competent, intelligent, you fully understand the nature of your rights and the consequences of doing what you are suggesting you might do, to make sure it is done freely and voluntarily with the complete understanding that it is not coerced in any way, and if, in fact, you make that determination and the Court is satisfied that all of those things are true, you may, obviously, Mr. Roggio, proceed to represent yourself

I will indicate, very frankly, and because I think to do otherwise, I think, very frankly, would keep the jury totally confused that, in fact, you made the decision to, in

fact, represent yourself; that the Court has made available to you an individual who the Court feels and is satisfied is an expert with regard to representation of these matters, who will be available to you so that you can seek his counsel and assistance, and to explain, frankly, Mr. Zenobi's presence in the courtroom.

But you certainly may represent yourself.

DEFENDANT ROGGIO: Thank you, sir.

THE COURT: Is that your desire?

DEFENDANT ROGGIO: Yes, it is.

THE COURT: All right. Let me ask, if you will, [7] to step in front of the microphone, please.

Mr. Court Reporter, swear the defendant.

VINCENT VICTOR ROGGIO, DEFENDANT, SWORN.

THE COURT: Let the record reflect that the sole and only purpose for the Court inquiring of the defendant is to ascertain his awareness of the consequences of his decision, to satisfy the Court that he is alert, competent and intelligent, that he, in fact, is making the decision that he has announced to the Court freely and voluntarily.

And with that understanding, then, the Court will, in fact, proceed to allow the waiver to take place.

Mr. Roggio, your full name, please, sir?

DEFENDANT ROGGIO: Vincent Victor Roggio.

THE COURT: And how old are you, sir?

DEFENDANT ROGGIO: Forty-three.

THE COURT: How far did you go in school?

DEFENDANT ROGGIO: Two years of college.

THE COURT: What did you take up in those two years?

DEFENDANT ROGGIO: Business.

THE COURT: Where did you go to college?

DEFENDANT ROGGIO: Temple University.

THE COURT: How long ago was that?

DEFENDANT ROGGIO: I don't know—twenty years, approximately.

[8] THE COURT: What has been your primary occupation during your adult life?

DEFENDANT ROGGIO: Real estate investments.

THE COURT: Have you ever, in fact, during the course of your adult life been called upon to appear in court in which you actually represented yourself?

DEFENDANT ROGGIO: I have not, sir.

THE COURT: Have you, in fact, been present in a courtroom when cases are tried?

DEFENDANT ROGGIO: Not really, no.

THE COURT: So that you neither have civil nor criminal experience?

DEFENDANT ROGGIO: None whatsoever.

THE COURT: Have you, in fact, seen and been privy to the indictments in this case?

DEFENDANT ROGGIO: I have.

THE COURT: So that you understand what, in fact, you are charged with?

DEFENDANT ROGGIO: I do.

THE COURT: I assume that you are totally untrained in the law?

DEFENDANT ROGGIO: Correct.

THE COURT: And particularly in the area of what we would call the Rules of Evidence?

DEFENDANT ROGGIO: Correct.

[9] THE COURT: Have you ever been treated for any mental or emotional disability?

DEFENDANT ROGGIO: Never.

THE COURT: Are you presently taking any medication of any kind?

DEFENDANT ROGGIO: None whatsoever.

THE COURT: Are you presently under the influence of any narcotic or alcoholic beverage?

DEFENDANT ROGGIO: No, sir.

THE COURT: This decision on your part to represent yourself, has this been something which you have, in fact, discussed with either Mr. Zenobi or Mr. Hughes, who was your previous counsel, or any other lawyer?

DEFENDANT ROGGIO: Never.

THE COURT: Is the decision on your part a free and voluntary one?

DEFENDANT ROGGIO: As to the circumstances, yes.

THE COURT: From the standpoint of your decision, other than how you perceive the situation, are you, in fact, or have you, in fact, been threatened or coerced into this position, this decision?

DEFENDANT ROGGIO: Coerced? No. Put in the situation, yes.

* * * *

[21] For some reason there does not appear to be any orders specifically addressing consolidation regardless of the fact that throughout these proceedings, at least since September 26th, there is no question that the Court intended to try this case as it is.

The Court is going to maintain that position and is, in fact, formally on a nunc pro tunc fashion consolidating these cases for the purposes of trial. . . .

* * * *

(Pre-trial Status Conference, Jan. 14, 1987)

[11] MS. HECK: 804(b)(5), yes, Your Honor.

And the only other matter that I have on my list, Your Honor, is I know that we have had several discussions about Mr. Roggio's posture with regard to speedy trial, and correct me if I am wrong, at our last session was it understood that there was going to be a written waiver coming forward from Mr. Roggio on this matter?

THE COURT: I have to be honest with you, I don't recall.

Mr. Zenobi, what is your recollection?

MR. ZENOBI: I don't recall.

THE COURT: Do we have a speedy trial problem?

MR. ZENOBI: I don't think so.

THE COURT: You don't think so?

MR. ZENOBI: If I were a wagering fellow, I would say none.

THE COURT: What is your recollection of what took place with regard to Mr. Roggio as far as the waiver is concerned?

MR. ZENOBI: I believe you asked for the execution of a speedy trial form, waiver of speedy trial form, and that was so executed. I don't have any other recollection.

THE COURT: Has that been done?

MS. HECK: You are talking about back early in '86?

[12] MR. ZENOBI: Right.

MS. HECK: I will check the file, Your Honor, as to whether or not there is.

THE COURT: My sole and only concern was that as I read some of the Eleventh Circuit cases, you have to take it up through and including a specific date as against a general type of waiver.

MR. ZENOBI: I would be very surprised if there was a problem.

THE COURT: Well, I will be much more surprised if you become surprised, Mr. Zenobi.

MS. HECK: Your Honor, I have reviewed the Court's order. Let me just comment—

THE COURT: That isn't a threat. That is just common old intimidation, Mr. Zenobi.

MR. ZENOBI. I will take notice of the fact that the Court has taken judicial notice of my being intimidated.

THE COURT: Very good. Okay.

* * * *

FEDERAL BUREAU OF INVESTIGATION

Date of Transcription 5/26/83

Jones Lynn Helms, Administrator, Federal Aviation Administration (FAA) 800 Independence Avenue, S.W., Room 1010, Washington, D.C., telephone (202) 426-3111, was interviewed by SA's Simon Markovich, Jr., and Gary N. Favitta, who identified themselves to Helms as Special Agents of the Federal Bureau of Investigation. At the outset of this interview, Helms was advised by SA Markovich that he was being interviewed concerning possible banking irregularities taking place at the Barnett Bank in West Palm Beach, Florida, involving accounts allegedly associated with himself and Vincent Victor Roggio. Helms furnished the following information:

* * * *

Concerning the unsecured $500,000 loan at Barnett Bank, dated October 14, 1982, Helms advised that in all probability he signed the loan instrument but could not specifically recall signing it or furnishing financial statements at this time. Helms stated that no one had his power of attorney and his signature would have been needed on all loan instruments to which he was a part of. Because of the volume of business Helms was involved in, and the fact that his investments have always been handled by others, Helms could not recall signing specific loan notes he was associated with.

Helms stated that he was not aware of any personal checking accounts at the Barnett Bank in his name. He cited as a main reason for his thinking this was the fact that he did not recall receiving bank statements for any such account, but again added that there was the possibility that he signed signature cards and did not recall doing so.

* * * *

Helms advised that the over due interest on the $500,000 unsecured loan at Barnett Bank dated October

14, 1982, was the only time he was aware of being in arrears as far as interest payments on one of his obligations. Upon receiving a letter from Barnett Bank stating interest payment was overdue, Helms sent the letter to his accountant, Robert Drumheller, in Pennsylvania. Helms stated that the interest payment check would in all probability have been signed by Drumheller or Roggio. Helms added that when he confronted Roggio with why the interest payment was late Roggio advised Helms that Drumheller had emergency surgery (ailment unspecified) in January, 1983, and because of that Drumheller fell behind in the payment of the interest. Concerning a second interest payment on the same loan, a check of $14,643.83 dated April 12, 1983, drawn on CitiBank, Helms advised that he did not know anything about this payment, but acknowledged that he and Roggio had personal checking accounts at CitiBank. Helms stated that he does not sign any checks to pay bills, but only for transfer of funds from one account to another. Helms advised that at any given time, he presigned 10 or 20 checks on various accounts and furnished them to Roggio for Roggio's use as he saw fit to use them in the management of Helms' financial holdings.

Helms advised that he talked with Barnett Bank Officer George Wilde, concerning a possible check writing incident that allegedly involved Barnett Bank. Helms stated that he personally directed the transfer of 1.3 million dollars from his Riggs National Bank account in Washington, D.C. to his CitiBank account on late Wednesday, specific date unrecalled. CitiBank did not credit Helms' account until late Thursday the following day. Roggio early on that Thursday paid the Barnett Bank obligation at which time Barnett Bank officials called CitiBank to verify the funds. CitiBank did not have the funds posted at the time the call from Barnett Bank was made and told Barnett Bank officials that insufficient funds were in the account to cover the check. Helms advised that the misunderstanding was eventually cleared up and

furnished the names of Don Anderson, CitiBank, and Joe Albritton, Riggs National Bank as individuals who could corroborate this information.

Concerning George Wilde, Helms advised that he did not recall ever personally meeting Wilde prior to the incident involving the $500,000 loan at Barnett Bank dated October 14, 1982, but again added that he could not be completely positive. Helms advised that he heard from the banking community that Wilde was an aggressive officer in a small bank and enjoyed a very good reputation as a bank executive.

* * * *

FEDERAL BUREAU OF INVESTIGATION

Date of Transcription 9/30/83

Jones Lynn Helms, Administrator, Federal Aviation Administration (FAA), 800 Independence Avenue, S.W., room 1010, Washington, D.C., telephone number (202) 426-3111, was interviwed by SA's Simon Markovich, Jr., and Gary N. Favitta, who identified themselves to Helms as Special Agents of the Federal Bureau of Investigation. At the outset of the interview, Helms was advised that he was being interviewed concerning possible banking irregularities taking place at the Barnett Bank, in West Palm Beach, Florida, involving accounts allegedly associated with himself and Vincent Victor Roggio. Helms furnished the following information:

Helms was shown the following copies of Barnett Bank documents which proportedly contained the signatures of Helms:

1) Itemization of amount financed.

2) Promisary note for $350,000.

3) Promisary note for $150,000.

4) Account signature card for account number 1452098354 at the Barnett Bank.

5) Barnett Bank starter check dated January 11, 1983 payable to Vincent Roggio in the amount of $1,125,000.

6) Letter of acceptance dated October 8, 1982 regarding a "line of credit" approved jointly for $350,000.

Upon reviewing signatures proported to be his on the above mentioned documents, Helms advised that none of those signatures were, in fact, written by him. Helms stated that he did not know if Roggio signed Helms' name to these documents. Helms recalled giving Roggio

authority to sign his name on documents in the past. Helms, upon being asked to be more specific, advised that this occurred in 1978, 1979 and possibly 1980. Helms estimated that Roggio used this authority approximately six to eight times on matters described to Helms as minor. Helms could not recall any further specific information on this matter.

Helms did not specifically recall giving Roggio authority to sign his name on documents involving the Barnett Bank, Delray Beach, Florida, but added that he could have and did not specifically recall. Helms recalled Roggio had opened bank accounts in Helms' name and signed Helms' name to documents involving the processing of the account which included the signature card. Helms cited one occasion he was aware of which involved an account opened for the investment in thoroughbred horses. Helms could not recall the name of the bank or the time frame involved. That was the only situation Helms was personally aware of Roggio opening a bank account in Helms' name, but added there may have been similar accounts in which the bank statements and correspondence went directly to Helms' accountant.

Helms estimated his financial assets to be well over $100,000,000 and did not usually get involved or concerned with daily transactions under $1,000,000. Transactions over $1,000,000 did normally get his attention.

Helms advised the Barnett Bank loans were used for interim financing of three refrigerated ships. Helms advised that he thought these ships were purchased from a Swedish shipping company that was in financial trouble. Helms added that it was a usual business practice of Roggio and his to purchase companies that were in financial trouble and eventually sell them for profit. Helms advised two $100,000 payments were made by Roggio to Barnett Bank in June, 1983 and July, 1983 in partial agreement to the repayment schedule for those loans. Helms gave Roggio five blank signed checks drawn on

Citibank to be used as the repayment instruments for the Barnett loans. Helms stated payment on the loans may have already taken place, but he could not say for sure.

Helms was not aware of any check kiting scheme taking place between Barnett Bank and Citibank involving his accounts. He noted that this would have involved day-to-day banking transactions of which he did not get involved with. Citibank conducted an audit of his cash and assets along with a quick asset ratio summary in June or July, 1983 and everything checked to Helms' satisfactory. Based on that audit, Citibank increased Helms' line of credit to $21,000,000. Helms advised these audits would be performed on a quarterly basis with the latest one being completed approximately September 9, 1983, again with positive results. Helms added that based on this last audit, Citibank was going to increase his line of credit to $24,000,000.

* * * *

Def. Ex.
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STATEMENT BY JOHN M. DUANE, JR.
RE: VINCENT ROGGIO/J. LYNN HELMS
MAY 2ND, 1983

* * * *

On Friday, April 29th, Mr. LeBlanc met with me in my Delray Office were he called Mr. Jim Cavanaugh of the FBI in West Palm Beach, Florida, and Mr. Cavanaugh informed me that it appeared that Mr. Roggio had twelve past inditements, one in Sacramento, California where he had declared bankruptcy and another one where the subject falsified an appraisal on a yacht from $100,000 to $500,000 causing a lending institution in South Broward County to lose perhaps $500,000.

DEFENDANT'S EXHIBIT NO. 128

BARNETT BANK Interoffice Memo

To	John M. Duane, Chairman of the Board
Location	East Delray
From	George Wilde
Location	Riviera Beach
Subject	Roggio - Helms Loan
Telephone	845-3526
Date	May 5, 1983

The following is a chronological sequence of events regarding our efforts to resolve the problem pertaining to the Roggio-Helms Loan.

May 2nd—After receiving a telephone call during which you informed me of the negative information that had developed regarding Mr. Roggio's financial dealings in the past, I immediately reviewed all of our files to determine if we had exercised sound judgment in exercise of due diligence in the development of credit and financial information on both of the parties involved and further to review the activity on the account since its inception. After reviewing the files, I contacted Jim LaBlanc to discuss with him exactly what the information was that the FBI had given to him. During the conversation, it was revealed that the FBI did not volunteer this information to LaBlanc but in fact, LaBlanc did go to the FBI and solicited the information. This was quite surprising in that I nor anyone else and presumably, I include you in this group, had no knowledge of any investigative proceedings.

After my conversation with LaBlanc, I went to our attorneys' office and fortunately I was able to meet immediately with Mr. Moyle and Mr. Richard Groner and I explained to them, to the best of my ability, as to what the situation was and recapped how Roggio and Helms was introduced to the Bank and what our activity had been up to date. It was agreed that we would attempt to verify the validity of all of the corporations listed on the financial statements and also, check the Public Records in California to determine if there had been a bankruptcy and Mr. Moyle would attempt to make contact with James Cavanaugh, Special Agent, Federal Bureau of Investigation. Subsequent to our meeting, I had a call from Mr. Moyle who stated he had been very much concerned about the situation and requested that we meet the following morning.

May 3rd—I meet with Mr. Moyle at 9:30 a.m. and delivered to him all of our files regarding Roggio-Helms and we proceeded to review the contents of the file in order to determine a course of action that would be in the best interest of the Bank. Immediately, the following points were agreed:

1. Based upon the information we had, we would call the loan.
2. We would be extremely discreet in discussing this matter within the Bank and with other Banks in the Barnett system.
3. That I would be the spokesman for the Bank in this matter and that no other officer would be authorized other than yourself to discuss any part of our involvement with Roggio and Helms.

Mr. Moyle contacted Jim LaBlanc and discussed with him how the FBI became involved in this matter and exactly what information was given to them. He requested that LaBlanc come to the office with his file so that Mr. Moyle could examine them in detail and further discuss the

matter with LaBlanc. It was determined that not only had verbal information been given but also that credit files had been available for review and other hard copy information relative to deposit accounts had been delivered to the FBI. Mr. Moyle subsequently contacted James Cavanaugh and solicited from him detailed information regarding Mr. Roggio's past and Cavanaugh informed him that he had requested updated information from California regarding Roggio's activities in that state and that upon receipt, he would advise Mr. Moyle if they received any current information. Cavanaugh informed Mr. Moyle that he had intended to call me to discuss this matter so I contacted Cavanaugh and we established a meeting for 8:30 May 4th.

May 4th—I meet with Mr. Cavanaugh for in excess of an hour in which we discussed all facets of Mr. Roggio's activities with the Bank and Mr. Helms' and particularly how they had been introduced to the Bank. Mr. Cavanaugh was joined by another agent and both of them continued to interrogate me to determine what involvement Mr. Helms has had in the credit. It appeared that they were interested in determining as to whether or not Mr. Helms has any direct activity with Devon Industry. Mr. Cavanaugh quoted to me excerpts from the files relative to Roggio's background and based on the information they have in file, it seems as if Roggio has been indicted on eleven counts of fraud, embezzlement, and credit card fraud; however, the indictments were nolle prossed as a result of Roggio having made restitution to all parties involved. To the alleged bankruptcy in California, it turned out that there was not a bankruptcy per se; however, Roggio did file a petition in bankruptcy but it was denied by the bankruptcy judge and according to the FBI file the judges comments in denying the petition was that it appeared that there were two con artists fighting each other and this was not an issue to be considered by the Bankruptcy Court. The file further indicated that Roggio had purchased a yacht for approxi-

mately $180,000 and then obtained an alleged falsified marine survey which indicated the value to be approximately $450,000 and Roggio proceeded to obtain a loan from Chase Manhattan Bank of approximately $400,000 and then defaulted on the loan and the Bank repossessed its collateral and subsequently sustained a large loss. The Bank involved was Chase Manhattan Bank and again, according to our records the United States District Attorney in New York did not feel that there was sufficient evidence of any interstate violation that would allow them to bring a charge successfully against Roggio and therefore, the matter was dropped. During my visit, I was somewhat upset to notice that a great many parts of our file had been reproduced and were in Cavanaugh's file; one particular item was a copy of a signature card for Mr. Helms and on the information side of the card, it indicated that Mr. Helms was an employee of Devon Industries and when in fact, at the date on the card, Mr. Helms was Director of the Federal Aviation Administration. This could be a source of embarassment and Mr. Cavanaugh informed me that he had some questions himself regarding any civil liability that the FBI might have by having these records and he did ask for an opinion from the U.S. Attorney and the opinion was that to this point he did not feel that there was any problem because, according to him, the Bank did have probable cause to suspect a fraud and therefore, would be protected against any claims that might be brought by either Helms or Roggio. I later discussed this matter with Mr. Moyle and he advised that he was not comfortable with the situation and was not going to accept this third hand opinion.

DEFENDANT'S EXHIBIT NO. 8

BARNETT BANK Interoffice Memo

To	John M. Duane, Chairman of the Board
Location	East Delray
From	George Wilde
Location	Riviera Beach
Subject	Roggio - Helms
Telephone	845-3526
Date	May 10, 1983

On May 9th, I received a telephone call from Mr. Helms stating that he had misplaced the demand letter which I presented to him during our recent visit and he thought possibly I had inadvertently put the letter back in my briefcase as a result of confusion that was going on at the end of the meeting. I informed him that I had left the letter on his desk and at that point, he said his regular secretary was absent as a result of illness but would be back within a day or so and that she probably had misplaced it. He further stated that if it was not located by May 10th he would ask his secretary to call and have Janice read the letter to her so that she could make a copy for him. I informed him that the letter was very brief and was a demand for payment by May 9th. He also informed me that he had conversations with Roggio and as a result, he had retained an independent audit firm to proceed to audit all of his affairs with Roggio and particularly the assets which were transferred to Roggio as Trustee. I spoke with Richard Allen, Barnett of Marion County, and in accordance with John Flanigan's instruction I informed him that we saw fit to call the Roggio-Helms loan for "non-financial matters". I also informed him that I would give him more definitive explanation after we had resolved our problems.

(jm) GIW [Illegible]

May 13, 1983

Received call from James Cavanaugh, agent FBI, during which time he questioned me at length regarding the conversation which I had with Mr. Helms in Washington. He asked if I was present when Helms called Mr. Webster; I answered yes. He asked how I know it was Judge Webster. I informed him that the speaker phone was on and I heard him request a number from someone for the FBI headquarters. He asked how I knew he was in dialing that number and I stated I remember the number to be 341-3000 and he stated that was correct, at least the 3000 part. He asked if I heard Mr. Helms make any reference to the White House. I stated no. He then asked the question again; same response. He asked if Judge Webster made any reference to another ongoing investigation outstanding in south Florida to which I replied, no. He asked this question again; same response. He then informed me that the FBI was continuing on with its investigation and that he would talk with me later. Conversation ended.

* * * *

May 16, 1983

Called Helms. He stated he had just returned from trip. He had retained auditing firm to audit Trust and all business dealings with Roggio. Advised that he had located demand letter and "would take care of the matter". He advised that he would not be able to tell me when the matter of loans would be resolved because he did not know what his balance was and he would have to "move some funds around". He stated he would call me later in the week. Stated I could call him "anytime".

* * * *

May 20, 1983

Mr. Helms called the Riviera Beach Office and was referred to Cole Fitzgerald's office for me. Mr. Fitzgerald called J. M. Duane to determine if he was authorized to speak with Helms. He then contacted Helms and advised

that I was not available but Mr. Duane was and subsequently, he called Mr. Cuane. During the conversation, it was agreed that Mr. Helms would assume the responsibility for the loans and would retire them at the rate of $150,000 per month and that this would be confirmed in writing.

* * * *

May 25, 1983

I received a call from Mr. Helms during which he informed me that he was confirming the fact that he is assuming responsibility for payment of the debt and would, after checking his monthly cash flow, be able to amortize the loan at the rate of $100,000 and asked if this would be acceptable and I told him that would be agreeable to the bank. He stated that he might possibly be able to reduce by an amount in addition to the $100,000 but he was not certain. I asked him if this was a firm commitment on his part and I asked him to please confirm this in writing and he stated he would do so. He further informed me that he has spoken to Mr. Roggio and his attorney and that they were preparing to bring an action against the bank, at which time Mr. Helms informed them that he did not wish this to be done and that the matter should be forgotten. He also stated that Mr. Roggio was very upset. He further informed me that if there are any changes in regards to Mr. Roggio's attitude and to the situation in general, he would notify me immediately. I informed Mr. Moyle of the foregoing and he advised me that the FBI had served a subpoena on Jim LaBlanc subpoenaing all of our records. He further stated that he was going to meet with LaBlanc at 3:00 p.m. and review the subpoena and prepare to answer it.

May 25th—I discussed the matter of the subpoena with Cole Fitzgerald and he informed me that it was a Grand Jury Subpoena and was very specific as to the records they wish to see.

May 26th—I discussed the subpoena with Roger Savage and Roger advised that he was going to review the contents of our file with Mr. Moyle's office to determine that they were in proper order.

June 3rd—Roger Savage advised that he had met with Cole Fitzgerald and did review the files and assisted Fitzgerald in accumulating the records which had been subpoened. It was decided that the subpoena would be answered on the 14th of June and the subpoena items presented.

June 9th—Mr. Howie Day, an associate of Mr. Roggios, appeared at the bank in East Delray and presented to Mr. Duane a letter from a Mr. Neal Peterson, Attorney for Mr. Helms, confirming that Mr. Helms would acknowledge the debt and confirmed that he personally would retire the obligation at the rate of $100,000 per month until paid. Mr. Duane added a sentence to the letter and acknowledged agreement on behalf of the bank.

DEFENDANT'S EXHIBIT NO. 156

[SEAL]

In Reply, Please Refer to
File No. 196-250

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

Post Office Box 592418 AMF
Miami International Airport
Miami, Florida 33159

February 15, 1979

Mr. J. V. Eskenazi
United States Attorney
300 Ainsley Building
Miami, Florida 33152

Attention: Mr. Kevin M. Moore
Assistant U.S. Attorney

Re: Vincent Roggio
dba Central Valley Steel and
Pipe of Fresno, California,
and Birchminister Marine,
Possible Interstate Transportation
of Stolen Property-Fraud by Wire

Dear Sir:

This letter will serve to confirm a conversation on January 22, 1979, between Kevin M. Moore, of your office, and Special Agent (SA) John S. Sullivan, at which time the following facts were discussed:

An allegation had been lodged that Mr. Roggio, dba Birchminister Marine, had obtained loans from Aetna Business Credit, Los Angeles, California, and General Electric Credit Corporation, Miami, Florida, by use of a

fraudulently inflated survey of a yacht "Birchminister", as collateral. Investigation at GE Credit, Miami, determined that they had followed all normal business practices in the granting of a $225,000.00 loan to Birchminister. Mrs. Lucy Stanley, of GE Credit, advised that they had granted the loan based in large measure on a survey of the yacht but that the surveyors, Pascoe and Associates, Ft. Lauderdale, Florida, are known to be very reputable yacht surveyors. Inquiry of George E. Pascoe, owner of the surveying firm, elicited the information that he had independently arrived at the value of the yacht through his customary methods. He stated that he had set the value for the yacht, "Birchminister", at $525,000.00 on or about November 22, 1974.

In view of the above, Assistant U.S. Attorney (AUSA) Moore advised that there was no violation of pertinent federal statutes and that the initial allegation had been determined to be without substance as a result of investigation.

In view of Mr. Moore's decision, this office will conduct no further investigation into this matter.

Very truly yours,

BILL D. WILLIAMS
Special Agent in Charge

By: ROBERT FITZPATRICK
Supervisory Special Agent

DEFENDANT'S EXHIBIT NO. 157

UNITED STATES GOVERNMENT

MEMORANDUM

Date: 1/11/79

To: SAC, Miami

From: SAC, Sacramento (49-158) (C)

Subject: VINCENT ROGGIO, dba
Central Valley Steel and Pipe of
Fresno, California
Berchminister Marine,
ITSP; FBW—Planned Bankruptcy
OO: SC

Re Miami tel to Sacramento, 4/14/78.

For the information of Miami, a check with the Bankruptcy Court, Fresno, Califonia, determined that no bankruptcy has ever been filed by VINCENT ROGGIO, Berchminister Corporation, or Central Valley Steel and Pipe Company.

It was determined that there was currently pending a civil suit in Fresno County Superior Court filed by WILLIAM R. PONSOLDT of North American Realty Company, as plaintiffs vs. VINCENT V. ROGGIO, an Berchminister Corporation of California, Inc., doing business as Central Valley Steel and Pipe Company as defendant, and also a similar suit filed by MARC L. BERMAN as plaintiff vs. ROGGIO, and a cross complaint filed by ROGGIO vs. PONSOLDT and North American Realty Corporation as cross defendants. This matter was adjudicated in September, 1978, by Fresno County Superior Court. The adjudication determined that PONSOLDT and North American would take nothing by reason of their complaint in their action against ROGGIO, and that BERMAN take nothing by reason of his complaint against ROGGIO. The

court further ordered that cross complainant ROGGIO receive judgment for affirmance of rescission under his cross complaint, and recover consequential damages in the amount of $47,000 against the cross defendants PONSOLDT and North American Realty Corporation. The Court further ordered the defendant and cross complainant ROGGIO convey to North American Realty Company the Saddle River property in Florida free and clear of any encumberances by any lendors. In addition, they stated that cross defendants PONSOLDT and North American Realty Corporation shall deposit the amount of $47,000 into escrow, with the escrow holder to be selected by attorney for the cross complainant, and that the cross complainant ROGGIO shall deliver the necessary documents and deed of conveyance to the Saddle River property to effect the transfer of the property to North American Realty Corporation.

The evidence and testimony indicated that the Saddle River property, which is located in Florida, was not of the value represented by PONSOLDT to ROGGIO, and further ruled that the contract between PONSOLDT and ROGGIO was entered into because of intentional fraudulent misrepresentations made by PONSOLDT to ROGGIO.

This matter was discussed with AUSA JOAN MC INTOSH, Eastern District of California (EDC), Fresno, California, on 1/9/79, who advised that she would decline any consideration of any type of prosecution of ROGGIO in view of the findings of the Fresno County Superior Court, and the fact that it appeared that PONSOLDT may have been trying to defraud ROGGIO. She also declined any further consideration in view of the fact there would be no violation on ROGGIO's part in view of the fact that there was never any attempt by ROGGIO to file bankruptcy concerning Central Valley Steel and Pipe.

In view of this, Sacramento is placing their case in a closed status .

(Instruction Specially Proposed by the Government)
Defense of Authorization to Sign

One who causes a signature to be affixed by a person other than the named signer is not chargeable with fraudulent intent unless the signature was made without actual or apparent authority, or unless the signature was used otherwise to deceive. In this case, the defendant has put in issue the question of authorization to sign the name of J. Lynn Helms to certain documents. Accordingly, the burden of proof is on the Government to prove, beyond a reasonable doubt, that the defendant did not have authority to have the signatures placed on the documents and that the defendant did not reasonably believe that J. Lynn Helms had authorized his signature to be placed on the documents at issue.

RELEVANT STATUTES

18 U.S.C. Sec. 2—Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. Sec. 1341—Mail Fraud—Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. Sec. 1014—Loan and credit applications generally; renewals and discounts; crop insurance

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or

security, for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

Amendment VI—Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. Sec. 3161—Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

* * * *

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occures. . . .

* * * *

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

* * * *

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

* * * *

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding con-

cerning the defendant is actually under advisement by the court.

* * * *

(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that

it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b) or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation nor failure to obtain witnesses on the part of the attorney for the Government.

* * * *

18 U.S.C. Sec. 3162—Sanctions

* * * *

[(a)](2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of

this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

* * * *